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No. 89- _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TODD PATTERSON

Petitioner,

—v.—

FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government and JOHN DOE AGENCY, an unknown agency of the United States Government

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Frank Askin, Esq.
(*Counsel of Record*)
Rutgers School of Law
Constitutional Litigation Clinic
15 Washington Street
Newark, New Jersey 07102
(201) 648-5687
on behalf of the American Civil Liberties Union of New Jersey

QUESTIONS PRESENTED

1. Whether the provision of the Privacy Act, 5 U.S.C. 552(a)(e)(7), prohibiting a federal agency from maintaining records describing an individual's exercise of rights guaranteed by the First Amendment unless such maintenance is "pertinent to and within the scope of" an "authorized law enforcement activity" is satisfied by a showing that the record is merely "relevant to" a law enforcement activity without any finding that it is also "necessary"?

2. When a federal court finds that the public record demonstrates a genuine issue of material fact, does it violate fundamental principles of Due Process and the adversary system for the court to rely upon ex parte evidence presented in camera to

resolve the factual issue in the absence of a detailed showing of extraordinary circumstance?

3. Whether the United States Government may avoid liability for the unconstitutional acts of its agents in a suit for nonmonetary relief by refusing to reveal their identity, and thereby assert a lack of *in personam* jurisdiction?

LIST OF PARTIES

The caption of the case contains the names of all parties except the United States of America, which was not named in the Complaint but is the real party in interest under Count III. At the time of filing the Complaint, Todd Patterson was a minor suing by his parents. He subsequently came of age.

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Presbyterian Church v.
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Fed.R.Civ.P. 60(b).....15

52 Fed. Reg. 47230-36 (Dec. 11, 1987).....11-12

Books and Articles:

Askin, Police Dossiers and Emerging Principles of Constitutional Adjudication, 22 Stan. L. Rev. 196 (1970).....25

Comment, The Justiciability and Constitutionality of Police Intelligence Gathering, 30 U.C.L.A. L. Rev. 976 (1983).....25

Comment, Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act, 1981 Duke L. J. 116 (1981).....60

Donner, The Age of Surveillance: The Aims and Methods of America's Political Intelligence System, (1980).....20

Ehlke, The Privacy Act After a Decade, 18 J. Marshall L. Rev. 829 (1985).....19, 20, 39

Ehlke, The Privacy Act of 1974, in Privacy Law and Practice (M. Bender ed. 1987) ¶ 2.....19

Joyce, The Privacy Act: A Sword and a Shield But Sometimes Neither, 99 Mil. L. Rev. 113 (1983)....18, 39-40

Webster, Beyond Sovereign Immunity: 5 U.S.C. Sec. 702 Spells Relief, 49 Ohio St. L.J. 725 (1988).....60-61

Congressional Materials:

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Intelligence Activities and the Rights of Americans, Final Report of The United States Select Committee to Study Government Operations With Respect to Intelligence Activities, S. Rep. 755, 94th Cong., 2d Sess. (1976) (3 vols.) Book II.....17, 20

Legislative History of the Privacy Act of 1974, S. 3418 (Pub. L. 93-579): Source Book on Privacy, Joint Committee Print of Senate and House Committees on Government Operations, 94th Cong., 2d Sess. (1976).....18-19, 25, 27

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 893 F.2d 595 (1990), and is reprinted in the Appendix. (1a) The Third Circuit's order denying the petition for rehearing and suggestion for rehearing en banc is unreported. (130a) The decision of the United States District Court for the District of New Jersey is reported at 705 F. Supp. 1037 (1989), and is reprinted in the Appendix (48a). The opinion and order of the District Court denying plaintiff's motion for reconsideration is unreported. (126a) The opinion and order of the District Court denying plaintiff's motion to vacate the judgment or, in the alternative to supplement the record, is also unreported. (120a)

JURISDICTION

The judgment and opinion of the Court of Appeals for the Third Circuit, affirming the judgment of the District Court dismissing all counts of plaintiff's complaint, was entered on January 8, 1990. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc was entered on February 7, 1990.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant parts of the First Amendment to the United States Constitution; the Privacy Act, 5 U.S.C. § 552a(e); and Rule 56, Federal Rules of Civil Procedure, are included in the Appendix at 307a.

STATEMENT OF THE CASE

A. Factual Background

When plaintiff-petitioner was 11 years old, he embarked on an ambitious project to prepare a personal world encyclopedia. After exhausting local sources of information, the precocious Todd wrote to 169 countries requesting information about their peoples and governments. For his initial inquiries, Todd used envelopes bearing the return address of "Laboratory Disposable Products," a business operated by Todd's parents out of the family home in North Haledon, New Jersey. These letters of request were sent to the addresses of foreign governments and missions both within and outside the United States. (239a)[1]

Todd's interest in international

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[1] Since the case was dismissed on the defendants' motion for summary judgment, most of the facts supporting plaintiff's claims are set forth in the affidavits of Todd (239a) and his mother (246a).

affairs has not abated, and he continues his international correspondence in a quest for current information. Since his first mailings in 1983, Todd has received more than 50 pieces of mail in damaged condition, some entirely devoid of contents. In one instance, an envelope from the Soviet mission in New York City was received resealed containing a piece of mail from Sweden addressed to an unrelated individual in a nearby community. The Postal Service has been unable to provide Todd or his family with an explanation for the excessive amount of damaged mail he receives. (241a)

Through methods unknown to plaintiff, possibly as a result of unauthorized mail covers and illegal interference with both domestic and foreign mail, the defendant Federal Bureau of Investigation ("FBI") became aware of Todd's correspondence with

foreign government agencies and embassies. In 1983, FBI agent John E. Butenshoen appeared unannounced at the Patterson home. Agent Butenshoen was admitted to the house by Todd's mother, who was speaking to her husband on the telephone at that moment. Agent Butenshoen spoke to both Mr. and Mrs. Patterson about Todd's project. Mrs. Patterson then escorted the agent to Todd's room and permitted him to examine Todd's correspondence files.

On February 23, 1984, Agent Butenshoen prepared a file memo reporting on his visit to the Patterson home. The memo stated in part:

> Todd Patterson is a 12 year old boy who is in the midst of a school project wherein he is researching and writing an encyclopedia of the world. It is indicated that he has written to about 170 foreign countries for information. He advised that he figured he would write to all countries so he could see what type of information they could offer. This correspondence was enclosed in his father's business

envelopes.

* * *

In view of the above, Newark contemplates no further investigation in this matter. (D2)[2]

A notation on the memo stated that the title of the file was being changed from "Laboratory Disposable Products" to "Todd Patterson."

In 1987, Todd became aware of the existence of the Freedom of Information Act ("FOIA") and made a request to the FBI for any records it was maintaining concerning him or his activities. On August 12, 1987, Todd was informed by letter that the FBI was maintaining such records but that none of those records could be released to him for reasons of national security. (58-9a)

Todd has long contemplated a career in

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[2] The documents released to Todd are separately lodged with the Court as Supplemental Appendix of Documents. The initially released documents are designated D1-D13, in accordance with the FBI's original designations.

the foreign service (ergo his early interest in information about foreign countries), and he and his family became understandably alarmed to learn that the FBI did indeed consider him of interest for reasons of "national security." (244a, 249-50a)

As a result of Todd's appeals under the FOIA and this litigation, which was instituted in May 1988, some details of the records maintained on Todd have been disclosed. Main files and cross-reference files are maintained on Todd at FBI Headquarters in Washington, and at the Newark and New York field offices. Defendants acknowledge the existence of one main file and two cross-reference files in Washington Headquarters; one main file and two cross-reference files in Newark; and one main file and eight cross-reference files in the New York field

office. The Headquarters and Newark files initially identified by defendants included 13 documents (D1-D13), consisting of 30 pages, some of which were duplicates. The pages released to Todd were heavily redacted and referred to at least six other pages withheld in their entirety. Subsequently, following entry of summary judgment by the District Court, the Newark office identified four additional pages, which were partially released along with records on Todd which were being separately maintained by the New York FBI office. Seven redacted pages from the New York files were turned over to Todd.[3]

Although the Butenshoen memo of 1984 stated that Todd's case should be closed, new reports were added to Todd's

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[3] The documents in the final FOIA release to Todd following the entry of summary judgment by the District Court are contained in the Supplemental Appendix lodged with the Court, at DD1-DD17.

Newark file in 1987 and 1988. On June 23, 1987, the Newark FBI office sent an airtel to the Acting Director of the FBI concerning "Subject: Todd Patterson," which reviews the prior history of the office's investigation, but with the substance of the new communication excised. (D13) A March 18, 1988, memorandum addressed to the Newark Special Agent in Charge from a concealed source consists of a number of redacted paragraphs with only one unredacted sentence: "This entire communication is classified as secret." An attached page is withheld in its entirety. (DD3) The New York file includes, inter alia, newspaper reports and a picture of Todd clipped from the New York Daily News and stamped "SECRET." (DD14, DD15)

Todd, now 18, is completing his freshman year at the State University of

New York at Plattsburgh, where he is enrolled in the Canadian Studies Program. During the third year of the program, students have an opportunity to work with the Canadian Parliament, at which time he will require a security clearance. (250a)

B. Procedural History

In May 1988, Todd instituted a civil suit, through his father, against defendants FBI; John Doe, an unknown employee of the United States Government; and John Doe Agency, an unknown agency of the United States Government. The suit sought injunctive relief and/or damages under three distinct causes of action: (1) failure to comply with the Freedom of Information Act, 5 U.S.C. § 552; (2) violations of the Privacy Act, 5 U.S.C. § 552a(e)(7), by the FBI for its maintenance of records describing Todd's exercise of rights guaranteed by the First Amendment without legal justification; and (3)

violations by John Doe and John Doe Agency of Todd's constitutional and statutory rights to freedom of correspondence through the U. S. mails. (289a)

Following submission by the government of a Vaughn index,[4] explaining the FBI's claims of exemption from document disclosures under the FOIA cause of action, plaintiff served upon defendants 30 Interrogatories, mainly directed towards counts 2 and 3 of the complaint. Defendants objected to most of plaintiff's Interrogatories on grounds of privilege, and plaintiff moved to compel more responsive answers. (252a) [5] On the same

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[4] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[5] Among the information defendants refused to supply was the identity of the other federal agencies which provided information concerning Todd's correspondence (Interrogatories No. 25, 26 and 28) and the prefixes assigned to Todd's files (Int. No. 1(b)). (255a) The FBI classifies its records in 264 categories, from the benign to the dangerous, each with its own prefix. 52

date, plaintiff also moved for class certification. Neither of these motions was ruled upon by the District Court.

The government moved for summary judgment on counts 1 and 2 of the complaint and moved to dismiss count 3 for lack of jurisdiction over John Doe and John Doe Agency. Plaintiff submitted a Statement of Material Facts and the affidavits of Todd Patterson and his mother, Betsy Sue Roughgarden Patterson, in opposition to the motion. (225a) A hearing on all pending motions was scheduled for December 15, 1988. Judge Alfred Wolin heard argument first on the government's motion to dismiss, and postponed hearing on plaintiff's discovery

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Fed. Reg. 47230-36 (Dec. 11, 1987). As counsel explained to the District Court, it was crucial that the family know whether the FBI had classified Todd as a security risk or merely as a "precocious teenager." (199a)

and class action motions pending disposition of the government's motion. At the conclusion of the oral argument, Judge Wolin announced that he was

> not satisfied that the F.B.I. has demonstrated that the files maintained on a claim of exercise of first amendment rights were pertinent to an authorized law enforcement activity as required by the Privacy Act. In its current affidavits, the F.B.I. merely cites to the Espionage Act and to the Foreign Agents Registration Act. That is not sufficient to maintain records on citizens' exercise of first amendment rights except when related to specific law enforcement objectives. (221-22a)

He, therefore, ordered the FBI to submit an additional affidavit in camera "detailing how the records maintained on Mr. Patterson were pertinent and related to a specific law enforcement activity of the F.B.I." (222a) Subsequent to the hearing, Judge Wolin further instructed the defendant, by letter, to submit for his in camera inspection some of the

documents from Todd's file which had been withheld from plaintiff in whole or part. (115-16a)[6]

After ex parte review of the requested documents and an affidavit from Assistant FBI Director James H. Greer, Judge Wolin granted the government's motion for summary judgment in toto on February 7, 1989. (48a) Plaintiff filed a timely motion for reconsideration based on the court's reliance on ex parte submissions not shared with plaintiff or admissible in evidence in support of its dismissal of counts 2 and 3. (173a) Plaintiff contended that such reliance on secret evidence violated both F.R.C.P. 56, and Due Process. The motion was denied with an opinion by Judge Wolin on March 30, 1989. (126a) Plaintiff filed a timely notice of

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[6] Defendants also submitted a formal Claim of Privilege from Attorney General Dick Thornburgh in regard to the withheld documents under the FOIA.

appeal to the United States Court of Appeals for the Third Circuit.

After the summary judgment motion had been decided and judgment entered for defendants, plaintiff was informed by the FBI that several additional records concerning Todd had been located in the Newark regional office and that the New York regional office was maintaining a main file on Todd and eight cross-reference files. In April, plaintiff made a new motion to vacate the judgment or, in the alternative, to supplement the record, pursuant to F.R.C.P. 60(b), based on newly discovered evidence, to wit the additional documents from the FBI offices in Newark and New York. (167a) That motion was denied by opinion and order dated August 16, 1989. (129a) Plaintiff filed another timely notice of appeal to the Third Circuit from the denial of the Rule 60(b) motion, and the Court of Appeals issued an

order consolidating the two appeals.

The appeal was argued in the Third Circuit on November 9, 1989. An opinion affirming the District Court's decision was issued on January 8, 1990. (1a) Petitioner filed a motion for rehearing and rehearing en banc on January 19; it was denied without opinion on February 7, 1990. (130a)

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES UNRESOLVED ISSUES CONCERNING THE INTERPRETATION OF THE 16-YEAR-OLD PRIVACY ACT THAT AFFECT THE POLITICAL PRIVACY RIGHTS OF MILLIONS OF AMERICANS

The Privacy Act of 1974, adopted in the post-Watergate era, implements the spirit of the First Amendment and judicial decisions restricting governmental monitoring of protected political expression and action. Section (e)(7) of the act, which is at the heart of this

case, severely restricts both the collection and the maintenance by federal agencies of information describing an individual's First Amendment activity. Its adoption followed several years of Congressional investigations of the discredited practice of building data bases describing the political activities of government critics and others suspected of having unorthodox political views, a practice which was widespread in the J. Edgar Hoover era among other federal agencies as well as the Federal Bureau of Investigation.[7] The act was clearly

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[7] The problem is voluminously described in the 1971 hearings of the Ervin Committee, Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) (2 parts); and the 1976 report of the Church Committee, Intelligence Activities and the Rights of Americans, Book 2 of the Final Report of the United States Senate Select Committee to Study Government Operations With Respect to Intelligence Activities, S. Rep. 755, 94th Cong., 2d Sess. (1976) (3 vols.).

"designed to preclude the reoccurrence of [such] past governmental abuses." Joyce, The Privacy Act: A Sword and a Shield But Sometimes Neither, 99 Mil. L. Rev. 113, 131 (1983).

One of the legislators most closely associated with the enactment of the Privacy Act was Senator Sam Ervin of North Carolina, whose Senate Constitutional Rights Subcommittee hearings had focused on the domestic intelligence program of the United States Army. Senator Ervin's findings formed part of the backdrop for the Privacy Act:

> Despite First Amendment rights of Americans, and despite the constitutional division of power between the federal and state governments, despite laws and decisions defining the legal role and duties of the Army, the Army was given the right to create an informational system of data banks and computer programs which threatened to erode these restrictions on government power.[8]

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[8] Legislative History of the Privacy Act of 1974, S.3418 (Pub. L. 93-579): Source Book on Privacy, Joint

But it was not only the Army's political surveillance practices which were to be curtailed by § (e)(7). "Data collection abuses that accompanied the surveillance of citizens by military, intelligence and law enforcement agencies and the Watergate scandal" were all part of its legislative history. R. Ehlke, The Privacy Act of 1974, in Privacy Law and Practice (M. Bender ed. 1987) ¶ 2.01, at 2-3.[9] The FBI had been specifically chastised for its creation of a huge database describing the First Amendment activities of millions

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Committee Print of Senate and House Committees on Government Operations, 94th Cong., 2d Sess. 167 (1976) [hereinafter cited as Source Book].

[9] Richard Ehlke, attorney with the Congressional Research Service, Library of Congress, has been the main chronicler of the Privacy Act. See also Ehlke, The Privacy Act After a Decade, 18 J. Marshall L. Rev. 829 (1985). His chapter in the Bender treatise catalogs the "numerous [congressional] hearings held on aspects of privacy" during the period leading up to its adoption. Ehlke at 2-3 n.2.

of Americans. See Intelligence Activities and the Rights of Americans, S. Rep. 755, 94th Cong., 2d Sess. (1976)(3 vols.) Book II at 47, 316-41. See generally Donner, The Age of Surveillance: The Aims and Methods of America's Political Intelligence System (1980).

Although § (e)(7) represents only one part of the comprehensive legislation designed to safeguard many aspects of citizen privacy, as Ehlke has observed:

> The Act's prohibition against agency maintenance of records relating to an individual's first amendment activities embodies one of the concepts that motivated enactment of privacy legislation in the first place.

Ehlke, The Privacy Act After a Decade, 18 J. Marshall L. Rev. 829, 844 (1985). Despite the clear Congressional intent to end the discredited practice of creating and maintaining permanent files on individuals who had done nothing beyond

exercising rights protected by the First Amendment, there is mounting evidence that the FBI continues to do so, suggesting that the experience of Todd Patterson is just the tip of an iceberg. See, for example, the 1989 report of the United States Senate Select Committee on Intelligence, The FBI and CISPES, S. Rep. 46, 101st Cong., 1st Sess. at 128, reporting that "[t]he FBI files on the CISPES investigation contain information about the lawful political activities of Americans that should not have been collected by the U.S. government."[10]

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[10] The Committee in Solidarity with the People of El Salvador (CISPES) was a nationwide organization actively opposed to American policy in Central America. According to the Senate report, FBI Director Sessions testified that the CISPES investigation "caused information on rank-and-file members who had nothing to do with international terrorism to be included in the FBI case files." The FBI and CISPES at 99, citing Senate Select Committee on Intelligence Inquiry Into the FBI Investigation of the Committee in Solidarity with the People of El Salvador (CISPES), S. Hrg. 1051 (hearings of Sept. 14, 1988) at 122. It found that the FBI

Despite the continuing public importance of the issue, 16 years after the adoption of the Privacy Act, this Court has yet to give plenary consideration to a single case arising under it. One consequence of this failure may well be the conflict and disagreement among lower federal courts on the proper interpretation of § (e)(7).

A. The Third Circuit's Interpretation of § (e)(7) Undermines Important Congressional Policy Designed to Provide Individuals Maximum Protection for the Exercise of First Amendment Rights Free From Fear of Monitoring by Government Agencies

Without any factual explanation, the court below, like the District Court, held that the FBI did not violate § (e)(7) of

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had compiled 330 volumes of investigative files which were associated with the CISPES investigation, and that FBI inspectors identified a total of 24,285 unique names, consisting of 13,198 persons and 11,087 organizations in the main CISPES case files. Eighteen per cent of the indivdual names were indexed for future reference. Id.

the Privacy Act by maintaining more than half a dozen permanent, retrievable files describing Todd Patterson's innocent and protected correspondence seeking information from foreign governments. The court's decision was based on its determination that maintenance of those files was "relevant to an authorized law enforcement activity of the agency." (37a) That standard is not only at variance with those adopted by other Circuits, see pp. 36-40, infra, but seriously erodes, and threatens to nullify, the Congressional policy underlying § (e)(7).[11]

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[11] While the defendants have offered voluntarily to destroy Todd's files in exchange for abandonment of this litigation, they have not promised to exempt his continuing correspondence from monitoring; nor have they offered to prohibit the various FBI offices from establishing new files on Todd every time it is discovered that he has engaged in new correspondence with a "suspect" foreign government. It should also be noted that if this case is remanded to the District Court, a motion for class action certification is still pending.

Even prior to the adoption of the Privacy Act, this Court had held that American citizens had a First Amendment right to receive mail from Communist governments without having their names included on a permanent roster of recipients. Lamont v. Postmaster General, 381 U.S. 301 (1965).[12] Other cases held that the chilling effect inherent in governmental inquiry into the individual exercise of rights guaranteed by the First Amendment required constitutional protection. See, e.g., DeGregory v. New Hampshire Attorney General, 383 U.S. 825 (1966); Gibson v. Florida Legislative

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[12] The chilling effect on First Amendment rights caused by the government's action here is analagous to that condemned by the Court in Lamont, where it commented that "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" Id. at 307. Similarly will addressees be chilled to know that correspondence with Communist governments results in permanent dossiers in various FBI offices.

Investigation Committee, 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958). See generally, Comment, The Justiciability and Constitutionality of Police Intelligence Gathering, 30 U.C.L.A. L. Rev. 976 (1983); Askin, Police Dossiers and Emerging Principles of Constitutional Adjudication, 22 Stan. L. Rev. 196 (1970). The adoption of § (e)(7) of the Privacy Act was intended to expand and implement the First Amendment protections provided by the above cases, not to dilute them. This was made explicit by Congressman Ichord of Missouri, the sponsor of the law-enforcement exception to § (e)(7):

> Let the legislative history be explicit. None of the changes are intended to abridge the exercise of First Amendment rights.

Source Book at 902-03. Cf. MacPherson v. I.R.S., 803 F.2d 479, 484 (9th Cir. 1986)("By enacting this exception, . . .

Congress did not intend to dilute the guarantees of the First Amendment by authorizing the maintenance of files on 'persons who are merely exercising their constitutional rights.'" (quoting Clarkson v. IRS, 678 F.2d 1368, 1374 (11th Cir. 1982)).

In their crabbed interpretation of § (e)(7), the courts below totally ignored its context within the Privacy Act. A central purpose of the Act as a whole was to reduce the amount and type of personal information kept by the federal government. To that end, § (e)(1) mandates that agencies maintain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1) (emphasis added). Section

(e)(7) then adds the further restriction that when records deal with First Amendment activities they must also be "pertinent to and within the scope of an authorized law enforcement activity."

The Guidelines issued by the Office of Management and Budget ("OMB") pursuant to the Act, 5 U.S.C. § 552a(v), emphasize the relationship between the two sections:

> Whereas subsection (e)(1) generally enjoins agencies from collecting information not "relevant and necessary to accomplish a purpose of the agency," [subsection (e)(7)] establishes an even more rigorous standard governing the maintenance of records regarding the exercise of First Amendment rights.

Source Book at 1073 (emphasis added). Ironically, the Third Circuit applied a lesser standard for the maintenance of First Amendment information on individuals than that required for other personal records, by requiring they only be relevant, not relevant and necessary, to

agency activity. Such a view raises serious issues concerning the nation's constitutional and statutory commitment to informational privacy embodied in both the First Amendment and the Privacy Act.

B. The Decision Below Conflicts With the Interpretations of § (e)(7) Adopted by Other Circuits and the Intent of Congress

1. The Third Circuit erroneously decided that authorization to collect First Amendment information constituted justification for its permanent maintenance in individualized retrievable files

The Third Circuit opinion endorsed the District Court's conclusion that the authority to collect First Amendment information justified permanent maintenance of the information collected. (37-8a) The District Court had based that determination on the erroneous view that "All cases considering Section (e)(7) have concluded that even after the pertinent law enforcement activity has been

completed, the agency can continue to maintain the related records." (94a) In fact, two Circuits have held otherwise, MacPherson, 803 F.2d 479 (9th Cir. 1986), and Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980), and their conclusions would appear to be more faithful to the statutory language and legislative history of § (e)(7), which defines "maintain" as including four separate and distinct activities: "to maintain, collect, use or disseminate." 5 U.S.C. § 552a(a)(3).

In MacPherson, the Ninth Circuit engaged in an independent analysis of the IRS's need to maintain information lawfully collected during an authorized investigation of MacPherson's participation in "tax protester" conventions. 803 F.2d at 483. The court cited with approval the language of the

District Court in Jabara v. Kelley, 476 F. Supp. 561, 581 (E.D. Mich. 1979):

> Merely because [an agency] may act within its authority by monitoring the public or private speeches of a person in the course of a legitimate security investigation does not give it the right to maintain records relating to the contents of the speeches where the investigation does not focus on a past or anticipated specific criminal act. (Citations omitted.)[13]

MacPherson, 803 F.2d at 483 (emphasis added). However, since the information was not being maintained in files indexed to MacPherson, the court held that continued maintenance of the information was justified for the purpose of keeping an accurate record of the tax protester proceedings. Id. at 484-85.

Similarly, the D.C. Circuit, in addressing the authority of an agency to

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[13] The District Court's decision in Jabara was subsequently reversed by the Sixth Circuit, sub. nom. Jabara v. Webster, 691 F.2d 272 (1982), cert. denied, 464 U.S. 863 (1983).

collect information, held that each of the four components of "maintain" had to be separately considered, stating that "the Act clearly prohibits even the mere collection of such a record, independent of the agency's maintenance, use or dissemination of it thereafter." Albright, 631 F.2d at 918.

The Third Circuit's holding that authorized collection justified permanent maintenance of individually indexed records on Todd's exercise of First Amendment rights is also inconsistent with the legislative history of § (e)(7). The Senate Report clearly states that an agency's authority to investigate does not necessarily empower that agency to maintain the information gathered:

> [It is] the intent of the Committee . . . that in terms of privacy there should be a general policy to extend the zones of personal and group freedom from compulsory data collection so that matters that ought not to be

> considered in making decisions about individuals do not become part of a formal record at all.
>
> . . . [U]nder our Constitution, there are, or may be, some human activities of which Government should not take note for any purpose at all because of the detrimental effect on freedom, and . . . this is true whether or not the information is intended to be used to make decisons about specific individuals. . .
>
> The section is designed to implement the following policy judgments in the report:
>
> > A further consideration where need for collecting data is at issue is whether records should be retained beyond their period of likely use for the purposes for which they were originally collected. . . To the extent that evaluators today have such records to consult, especially for decisions that are not visible to the individual, the presence of such information represents a dead (and improper) hand from the past.

S. Rep. 1183, 93rd Cong. 2d Sess., reprinted in U.S. Code Cong. & Admin. News 6971 (1974) (emphasis added).

Rather than await the misuse of this information before complaining, as the FBI

in essence urges Todd to do, the Privacy Act was intended to prevent the maintenance of such information so that misuse does not occur.

> This section's restraint is aimed particularly at preventing collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that the Government or the particular agency might possibly have to deal with them in the future.

Id. at 6960-71 (emphasis added).

The Third Circuit's approval of the maintenance of permanent files on Todd is even at war with its own earlier opinion in Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975), which, inexplicably, the court did not even cite in the Patterson opinion. In Paton, a case which predated the enactment of the Privacy Act, the Third Circuit recognized a plaintiff's right to expungement of her FBI file under very similar circumstances. Responding to a claim that the FBI was maintaining

information concerning the First Amendment activities of a teenager after intercepting her letter to a domestic political organization as a result of a mail cover, the court held the plaintiff was entitled to seek judicial expungement of her record directly under the First Amendment. The court held that the existence of such a file threatened palpable harm to plaintiff. 524 F.2d at 868. On remand, the District Court provided such relief. Paton v. LaPrade, 469 F. Supp. 773 (D.N.J. 1978) and 471 F. Supp. 166 (D.N.J. 1979). Cf. Smith v. Nixon, 807 F.2d 197 (D.C. Cir. 1986) (opinion by Scalia, J).

Contrary to Paton, which recognized a right of direct action under the First Amendment to protect political privacy in the absence of Congressional action, the Third Circuit's new decision perversely

transforms the Privacy Act into a license for the FBI to invade such protected rights. However, rather than being intended to expand the authority of government agencies to maintain individualized First Amendment information, the Privacy Act was clearly intended to expand protection to individuals such as Lori Paton and Todd Patterson and to implement "Congress'. . . concern regarding the implication of computerized data banks for personal privacy..." United States Department of Justice v. Reporters Committee for Freedom of the Press, 108 S.Ct. 1468, 1478 (1989). It was in the Reporters Committee opinion that the Court emphasized the difference between mere governmental collection of personal information and its transformation into easily accessible personal dossiers. As the opinion by Justice Stevens explained, so long as

uncollated and irretrievable information sits in a government repository it remains in "practical obscurity." Id. at 1485. However, that same information gathered into a computerized, name-indexed system of records becomes a decided threat to personal privacy and implicates important policies embodied in the Privacy Act.

2. The "relevance" standard adopted by the Third Circuit conflicts with decisions of other Circuits

The statutory definitions contained in the Privacy Act do not include "pertinent to," "within the scope of" or "law enforcement activity," nor does the language itself provide substantive guidance. Further, the OMB Guidelines provide only general guidance. Thus, it is not surprising that the Circuits have developed conflicting interpretations of the law enforcement exception in § (e)(7).

In Patterson, the Third Circuit held that the exception applies where records on First Amendment rights are "relevant to an authorized law enforcement activity." (37a) The opinion noted the variety of standards articulated by the Circuits but made no effort to reconcile them or justify its own interpretation. (34-36a) Nor does the court provide any guidance as to the content of the term "relevance."

Prior to the decision of the Third Circuit in the instant action, four Circuits had spoken on the issue. Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983); MacPherson v. I.R.S., 803 F.2d 479 (9th Cir. 1986); Clarkson v. I.R.S., 678 F.2d 1368 (11th Cir. 1982), vacated and remanded, 691 F.2d 272 (11th Cir. 1982), cert. denied, 464 U.S. 863 (1984); Nagel v. United States Department of Health, Education and Welfare, 725 F.2d 1438 (D.C.

Cir. 1984) (adopting the Jabara standard).

In Jabara, the Sixth Circuit rejected the District Court's limitation of the law enforcement exception to records which "related to specific past, present or future criminal acts." 691 F.2d at 279-80. The Circuit determined that the District Court's interpretation was "too narrow" and held that the law enforcement exception permits maintenance of records describing an individual's exercise of First Amendment rights if "the investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative one." Id. at 280 (emphasis added).

However, prior to the Sixth Circuit's ruling, the Eleventh Circuit, in Clarkson, had adopted the Jabara trial court's narrower interpretation, and held that § (e)(7) is violated when the information

collected is "unconnected to any investigation of the past, present or anticipated violations of the statutes which it is authorized to enforce . . ." Clarkson, 678 F.2d at 1375.

In MacPherson, the Ninth Circuit struck out in a different direction altogether, adopting a case-by-case balancing test. 803 F.2d at 483-85. It rejected the "common feature" of both the Sixth and Eleventh Circuit standards, "their apparently definitive statement of a 'rule' with broad application to § (e)(7) cases." Id. at 483. See generally Ehlke, The Privacy Act After a Decade, 18 J. Marshall L. Rev. 829, 844 (1985) (criticizing a broad interpretation of the law enforcement exception); Joyce, The Privacy Act: A Sword and a Shield But Sometimes Neither, 99 Mil. L. Rev. 113, 132 (1983) (criticizing the Sixth Circuit for failure to adequately balance the

competing interests).

The Third Circuit expressly rejected an "ad-hoc" or case-by-case balancing test as set forth by the Ninth Circuit in MacPherson. (36a) Nor does its decision comport with the Eleventh Circuit's standard which required a direct connection to law violations -- past, present or future.

These are important issues which go to the heart of the Privacy Act's protection for First Amendment rights. After sixteen years, it is time that they be clarified.

II. THIS COURT SHOULD DECIDE UNDER WHAT CIRCUMSTANCES A FEDERAL COURT MAY RESOLVE DISPUTED ISSUES OF MATERIAL FACT ON THE BASIS OF EX PARTE, IN CAMERA EVIDENCE, AN ISSUE ON WHICH THERE IS DISAGREEMENT AMONG THE CIRCUITS

The District Court found on the public record that the government had failed to demonstrate the absence of a genuine issue

of material fact regarding the FBI's authority to maintain records on Todd's First Amendment activities. At the conclusion of the summary judgment hearing, the trial judge announced that he was "not satisfied" that the files maintained by the FBI on Todd "were pertinent to an authorized law enforcement activity as required by the Privacy Act" (221-22a), and directed the FBI to submit an ex parte affidavit justifying its claim of pertinence. (222a) Following his in camera examination of this additional "proof," the trial judge resolved his doubts and issued his opinion granting summary judgment to defendants, stating:

> Because the FBI had not made an adequate showing of the relevance of records maintained on plaintiff's exercise of First Amendment rights to an authorized law enforcement activity, the Court ordered the FBI to submit an in camera affidavit which would further attempt to demonstrate the required relevance. The FBI subsequently submitted the Greer

> affidavit to serve this purpose. Upon review of the Greer affidavit, the Court now finds that records maintained by the FBI on plaintiff's exercise of First Amendment rights are relevant to an authorized law enforcement activity of the FBI and that the continued maintenance of such records does not violate any provision of the Privacy Act. (97a) [emphasis added][14]

The resolution of disputed issues of material fact on the basis of secret evidence not shared with an opposing party

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[14] The District Court similarly resolved material issues of fact involved in plaintiff's third cause of action against John Doe Agency for illegal mail tampering on the basis of ex parte submissions, stating:

> After reviewing the record as a whole, including in camera inspection of the withheld documents and the Greer affidavit, the court finds, as a matter of fact, that the FBI and any FBI or other government employees involved in activities concerning plaintiff acted in accord with all applicable statutory and regulatory guidelines. (105-06a) [emphasis added]

The Court of Appeals affirmed the dismissal of the third count on an alternative theory of lack of in personam jurisdiction. See Point 3, infra.

raises fundamental issues of Due Process of Law and the adversary system, as well as issues concerning the operation of Rule 56 of the Federal Rules of Civil Procedure, never decided by this Court.

A. The Use of Secret Evidence to Resolve Genuine Issues of Material Fact Is Inconsistent With Fundamental Principles of Due Process as Well as F.R.C.P. 56

Prior to the 1984 decision of the Court of Appeals for the District of Columbia in Molerio v. United States, 749 F.2d 815, there is no clear authority in American law for a federal court to resolve genuine issues of fact going to the merits of a dispute on the basis of ex parte evidence.[15] Absence of prior

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[15] Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), leaves open the possibility of substantive consideration of an in camera affidavit on remand, but there is no clear holding on the issue. Disputes arising under the Freedom of Information Act may be disposed of on the basis of in camera examination of documents, but those cases are sui generis. The only substantive issue

precedent is not surprising, since it is axiomatic that Due Process of Law requires an adversary proceeding.[16] As observed by

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involved in such cases is the plaintiff's right of access to documents, and that right is itself limited by built- in exemptions for privileged documents. To require a full adversary proceeding in such cases would destroy a purpose of the legislation -- to limit public access to those documents not privileged -- in the very process of adjudication. Cf. Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 145-46 (1981).

[16] It is, of course, not unusual for a court to determine, as a result of in camera review, that certain evidence is privileged and not subject to discovery. See Reynolds v. United States, 345 U.S. 1 (1953); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978). See also United States v. Zolin, 109 S. Ct. 2619 (1989). However, the consequence in such cases is merely to remove the evidence from consideration and not to use it as the basis for resolving factual disputes. Thus, the fact that the government properly invoked the state secrets privilege in this case does not mean that the privileged evidence can be used in support of the government's summary judgment motion.

In a criminal proceeding, the government does not even have the option of suppressing "government secrets" which have relevance to the defense. Under the Classified Information Procedures Act ("CIPA"), Pub. L. 96-456, reprinted in 18 U.S.C. App. at 706 (1980), the government is put to a choice of releasing the

the District of Columbia Court of Appeals subsequent to Molerio:

> It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions.

Abourezk v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), aff'd 484 U.S. 1 (1987).[17] See also Fuentes v. Shevin, 407 U.S. 67, 81 (1972), reh'g denied, 409 U.S. 902 (1972)("[N]o better instrument has been devised for arriving at truth than to

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privileged material or foregoing prosecution of the defendant.

[17] Abourezk distinguished Molerio as a case involving "most extraordinary circumstances," Id. at 1061, without explaining what was extraordinary about it.

give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)); Carroll v. Princess Anne, 393 U.S. 175, 183 (1968) ("The value of a judicial proceeding . . . is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate."); Endicott Johnson Corp. v. Encyclopedia Press Inc., 266 U.S. 285, 288 (1924)("The words 'due process of law,' when applied to judicial proceedings, . . . require a proceeding which, . . . whenever it is necessary for the protection of the parties, gives them an opportunity to be heard respecting the justice of the judgment sought.").

The court below acknowledged the "anomolous situation" in which it placed the plaintiff by forcing him "to defend against a motion for summary judgment without being privy to the very documents necessary for such a defense," (20a) but felt that examination of the secret evidence by the judge afforded the plaintiff sufficient protection of his Due Process rights. (21a) However, this Court has frequently warned that ex parte judicial review is not an adequate alternative to adversarial examination. See Alderman v. United States, 394 U.S. 165 (1969), reh'g denied, 394 U.S. 939 (1969); and Dennis v. United States 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.").

The requirement of an adversary contest over the proofs is enforced at the point of summary judgment by Rule 56(e), which requires that supporting "affidavits shall . . . set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The claims that documents are both "privileged" and "admissible in evidence" are mutually exclusive.

B. There is Conflict Among the Circuits as to the Propriety of a Court's Resolution of Genuine Issues of Fact on the Basis of Ex Parte, In Camera Submissions

By following Molerio,[18] the court

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[18] In upholding the use of ex parte materials in support of a motion for summary judgment, the court below also cited three other cases which it claimed "allowed the use of in camera affidavits in national security cases." (20-21a) However, the other cases are quite distinguishable. Fitzgerald v. Penthouse Int'l Ltd., 776 F.2d 1236 (4th Cir. 1985), is a typical privilege case in which the suppression of privileged information leaves the plaintiff unable to establish a

below ignored the contrary authority from the First Circuit, which on several occasions has reversed lower court decisions because the trial judge had relied on privileged, ex parte materials in granting summary judgment. In Association for Reduction of Violence v. Hall, 734 F.2d 63 (1st Cir. 1984), the court held that Federal Rule of Civil Procedure 56 restricted the materials available to the court on a summary judgment motion to "those that would be admissible in evidence or otherwise available at trial." Id. at 67 (citing 6

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prima facie case. See note 14, supra. Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), cert. denied 464 U.S. 863 (1983), is a decision on an issue of law concerning the interpretation of the Privacy Act. See Point I, supra. While there is a reference to "in camera affidavits" submitted to the District Court, Id. at 279, there is no clear holding as to the propriety of their use in support of a motion for summary judgment. See note 15, supra. Hayden v. N.S.A., 608 F.2d 1381 (D.C. Cir. 1979), is an F.O.I.A. case. See note 13, supra.

Moore's Federal Practice, § 56.11 [1.-8] at 56-205 to 207 (1983)). Hall was a civil rights action by prison inmates who claimed they had been the victims of retaliatory transfers for the exercise of rights protected by the First Amendment. The trial judge acknowledged that in granting summary judgment he had reviewed certain documents which he had earlier ruled privileged and exempt from discovery by plaintiffs following an in camera examination. In reversing, the Circuit emphasized that in camera inspections should be "conducted solely to determine discoverability and not 'for the purpose of making any ex parte determination on the merits.'" Id. at 67. Hall relied on a prior Circuit opinion in Bane v. Spencer, 393 F.2d 108, 109 (1st Cir. 1968), cert. denied, 400 U.S. 866 (1970), which contains language particularly appropriate

to the instant case:

> [T]he defendant should not be able to use the [impounded] records as a sword to seek summary judgment and at the same time blind plaintiff so that he cannot counter. Defendant's affidavit must contain on its face, for plaintiff to see, whatever defendant wishes to rely upon to seek summary judgment.

A district court in Massachusetts subsequently applied the principles enunciated in Hall and Bane to a case involving a claim of national security privilege. Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), aff'd 845 F.2d 1111 (1st Cir. 1988). See also Kinoy v. Mitchell, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)("Our system of justice does not encompass ex parte determinations on the merits of cases in civil litigation. [I]f the documents are privileged [then] the litigation must continue as best it can without them ....")

While the District of Columbia Circuit

in both Abourezk and In Re United States, 872 F.2d 472 (1989), cert. dis. 110 S. Ct. 398 (1989), acknowledged a possible exception to the principle of an adversary contest over facts when national security secrets are involved, neither case offered a standard for determining when such an exception would apply -- other than to suggest that such a "draconian" procedure, In Re United States, 872 F.2d at 477, should be limited to cases involving "the most extraordinary circumstances." Abourezk, 785 F.2d at 1061.

The Fourth Circuit has had its own internal conflict over the propriety of dismissing a suit between private parties over a military contract because the government objected that the litigation would disclose privileged, national security information. Farnsworth Cannon Inc. v. Grimes, 635 F.2d 268 (1980). The majority of the court en banc reversed a

split panel opinion which held that the plaintiff should be given an opportunity to demonstrate a prima facie case without reference to the privileged materials. The majority held that "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States ... precludes any further attempt to pursue this litigation." Id. at 281. In dissent, Judge Murnaghan objected: "The opportunities for unexplicated imposition of arbitrary fiat under the rule the majority adopts are potentially frightening." Id. at 283. Judge Phillips wrote a separate dissent for three members of the court.

This case offers an appropriate vehicle for providing guidance to the lower federal courts on this exceedingly important and difficult question,

including whether there might be less drastic alternatives to dismissal which might be invoked even when significant government secrets might be at stake. Compare the test for the issuance of prior restraints against the revelation of government secrets, New York Times Co. v. United States, 403 U.S. 713 (1971), which, like secret judicial decisions, involves the subordination of fundamental constitutional rights in order to protect government secrecy.

III. DISMISSAL OF A CASE FOR LACK OF IN PERSONAM JURISDICTION BECAUSE THE UNITED STATES, THE REAL PARTY IN INTEREST, REFUSES TO DISCLOSE THE IDENTITY OF ITS AGENTS RESPONSIBLE FOR VIOLATING PLAINTIFF'S CONSTITUTIONAL RIGHTS IS INCONSISTENT WITH DOCTRINES OF THIS COURT DATING BACK TO MARBURY V. MADISON

The court below held that the refusal of the real defendant in interest, the United States of America, to reveal the identity of its agent wrongdoers stripped

the District Court of in personam jurisdiction over named defendants John Doe and John Doe Agency.[19] Such a bizarre holding raises important and novel issues of federal law never directly decided by this Court, and is in apparent conflict with well settled principles of constitutional jurisprudence.

Plaintiff's uncontradicted allegations established that (1) his first-class mail directed to foreign-government offices had been intercepted by some agent or agency of the United States government, which had so informed the FBI, and (2) over an extended period of time, his incoming mail from the domestic and overseas offices of foreign governments had been regularly

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[19] After determining that plaintiff would not be entitled to any further discovery as to the identity of the agents and/or agency that interfered with his mail, the Court of Appeals held: "Since the suit could not be maintained against a fictitious party, the district court lacked in personam jurisdiction." (45a)

opened and tampered with, to the extent that on one occasion he received an envelope from the Soviet mission in New York City containing inside an envelope from Sweden addressed to a total stranger in Wayne, New Jersey. (240-41a) In the absence of evidence of legal justification by the agency involved, Todd's sworn allegations would appear to establish a violation of his right to freedom of correspondence under the First Amendment. Ex Parte Jackson, 96 U.S. 727 (1878). Cf. Ramsey v. United States, 431 U.S. 606, 623-24 (1977); United States v. Leeuwen, 397 U.S. 249, 251 (1970).

Since the court below offered no authority other than its own ipse dixit to support its jurisdictional holding, it is not at all clear on what legal principles it was based. Certainly, there is no generic prohibition against a federal court's asserting in personam jurisdiction

over real but unknown defendants. See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Nor is petitioner aware of any authority that questions the power of a federal district court to assert personal jurisdiction over an agency of the United States government under Due Process standards required by either the Fifth or Fourteenth Amendments. Indeed, it is generally held that 28 U.S.C. § 1391(e), providing for venue in suits against federal officials in the district in which the plaintiff resides, also provides for in personam jurisdiction over the defendant in the same district. See Stafford v. Briggs, 444 U.S. 527, 553-54 (1980)(Stewart, J., dissenting)("The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem

exists.")[20]

The court's only explanation for its decision was the bald assertion that "suit could not be maintained against a fictitious party," a statement which, if taken literally, would be flatly contradicted by Bivens v. Six Unknown Agents, supra, and, therefore, can only have been intended to mean that a suit cannot be maintained against a fictitious party where it is certain that the party's identity will never become known.

While it is true that normally the inability to identify a tortfeasor would make litigation an exercise in futility, that is not true where the real party in interest is known and has appeared on

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[20] Justice Stewart's opinion also rejected the government's statutory argument that § 1391(e) "was designed only to govern venue and service of process, not to confer personal jurisdiction." 444 U.S. at 553 n.5.

behalf of the tortfeasor. Furthermore, at least one Circuit has now held that the 1976 amendment of 28 U.S.C. § 702, 90 Stat. 2721, permits the process of a federal court to directly reach the United States of America in a case such as this seeking nonmonetary damages. See Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989).[21] In reversing dismissal of a complaint against the United States for violation of the

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[21] Section 702 now reads:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, shall be entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party.

church's Fourth Amendment rights on sovereign immunity grounds, the unanimous Court of Appeals panel noted that "the clear objective of the 1976 amendment [to § 702] was to waive sovereign immunity as a defense in actions seeking relief other than money damages." Id. at 524. The court declared: "[T]he 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." Id. at 525.[22] See Comment, Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act, 1981 Duke L. J. 116. See

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[22] The court cited legislative history to the effect that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." 870 F.2d at 525 (quoting H. Rep. No. 1656, 94th Cong., 2d Sess., reprinted in U.S. Code Cong. & Adm. News 6121, 6129 (1976)).

also, Webster, Beyond Sovereign Immunity: 5 U.S.C. Sec. 702 Spells Relief, 49 Ohio St. L. J. 725 (1988).

If the Ninth Circuit is correct, any possible justification for the ruling below evaporates. Even though the United States had not been specifically named as a defendant, it was the real party in interest under count 3 of the Complaint, and its attorney, the United States Department of Justice, provided representation for all defendants. Under the circumstances, it would elevate form over substance to approve dismissal of the complaint on the ground that the real party in interest had not been listed in the caption. See Bowman v. United States Department of Agriculture, 352 F.2d 281, 283 (5th Cir. 1965). Furthermore, 28 U.S.C. § 1653 permits amendments of complaints, even on appeal, to cure jurisdictional defects, and has been used

to authorize amendments to add real parties in interest as defendants. International Brotherhood of Boilermakers v. Local Lodge D354, 897 F.2d 1400 (7th Cir. 1990); Bowman, supra, 352 F.2d at 283. Cf. Newman-Green, Inc. v. Alfonzo-Larrain, 109 S. Ct. 2218, 2222 (1989) ("[E]very Court of Appeals that has considered the scope of § 1653 has held that it allows appellate courts to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts.")[23] See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982), holding that "a cause of action is a species of property" protected by the Due Process Clause which

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[23] In view of the fact that the Court of Appeals dismissed count 3 on a ground not relied upon by the District Court, it would not be wholly inappropriate for this Court to remand for consideration of the question of amending the caption. On the other hand, it would probably be "a waste of time and resources." Compare Newman-Green v. Alfonzo-Larrain, 109 S. Ct. at 2226.

may not be denied for procedural technicality "unless the balance of state and private interests favors the government scheme." Id. at 430 n.5.

Furthermore, the dismissal of the complaint because of the refusal of the real party in interest to provide information necessary to determine actual personal jurisdiction over the named defendant raises important issues as to the scope of this Court's ruling in Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee, 456 U.S. 694 (1982), holding that a federal court could infer the facts necessary to establish personal jurisdiction where a defendant resisted discovery of facts relevant thereto.

Finally, the ruling below raises substantial issues concerning the duty of federal courts to provide redress when a litigant demonstrates a prima facie case

of violation of constitutional rights. The provision of judicial redress for such wrongs was described by this Court in Marbury v. Madison, 1 Cranch 137, 163 (1803), as "the very essence of civil liberty," a principle that was reaffirmed in Bivens, 403 U.S. at 397. The conclusion of the court below that such redress could be denied by the unilateral action of the real defendant in interest, would appear to raise the most fundamental questions about the nature and function of judicial review under the United States Constitution, questions which demand examination by this Court.

CONCLUSION

For the reasons stated herein the petition for certiorari should be granted.

Respectfully submitted,

Frank Askin
(Counsel of Record)
Constitutional Litigation Clinic
Rutgers School of Law
15 Washington Street
Newark, N.J. 07102
(201) 648-5687

on behalf of the American Civil Liberties Union of New Jersey